Petition

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

EDDIE ODOM

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

Petition for A Writ of Certiorari to the Supreme Court of Florida

---

Brief Of Petitioner

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QUESTIONS PRESENTED

I. Whether The Trial Court's Refusal To Grant A Mistrial When One Of The Jurors Was Threatened With Death, And Whether The Trial Court's Refusal To Grant Petitioner's Motion To Interview Jurors, Denied Petitioner His Right To An Impartial Jury Trial Under The Sixth And Fourteenth Amendments And His Right To Due Process Of Law Under The Fourteenth Amendment.

II. Whether The Supreme Court Of Florida's Refusal To Reverse Petitioner's Conviction Based On Evidence Admitted In Violation Of The Florida Constitution Violated Petitioner's Rights Under The Due Process And Equal Protection Clauses Of The Fourteenth Amendment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT

I. Petitioner has denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution 7

II. Petitioner was denied his rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment 14

CONCLUSION 19

CERTIFICATE OF SERVICE 20

APPENDIX A:
Opinion of the Florida Supreme Court dated July 23, 1981 ..... A-1

TABLE OF AUTHORITIES

CASES CITED

Page

Ballew v. Georgia, 435 U.S. 223 (1978) 8

Brown v. Louisiana, —U.S.—, 100 S.Ct. 2214 (1980) 13

Chambers v. Mississippi, 410 U.S. 284 (1973) 15

Cupp v. Naughten, 414 U.S. 141 (1973) 15

Demps v. State, 395 So.2d 501 (Fla. 1981) 17

Duncan v. Louisiana, 391 U.S. 145 (1968) 8

Duren v. Missouri, 439 U.S. 357 (1979) 8

Gold v. United States, 352 U.S. 985 (1957) 10

Griffin v. Illinois, 351 U.S. 12 (1956) 15

Hoberman v. State, 400 So.2d 758 (Fla. April 30, 1981) 16

Jacobs v. State, 396 So.2d 1113 (Fla. 1981) 17

Knight v. State, 394 So.2d 997 (Fla. 1981) 17

Morgan v. United States, 380 F.2d 915 (5th Cir. 1967) 12

Palmes v. State, 397 So.2d 648 (Fla. 1981) 17

Perry v. State, 395 So.2d 170 (Fla. 1981) 17

Remmer v. United States, 350 U.S. 377 (1956) ... 8, 12

Richardson v. United States, 360 F.2d 366 (5th Cir. 1966) 11

Ristaino v. Ross, 424 U.S. 589 (1976) 13

Russ v. State, 95 So.2d 594 (Fla. 1957) 11

Singer v. United States, 380 U.S. 24 (1965) 8

State v. Sarmiento, 397 So.2d 643 (Fla. 1981) 14, 16

Straight v. State, 397 So.2d 903 (Fla. 1981) 18

Turner v. Louisiana, 379 U.S. 472 (1965) 13

United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) 12

United States v. Rowell, 512 F.2d 766 (8th Cir. 1975) 11

Williams v. Florida, 399 U.S. 78 (1970) 8

Witherspoon v. Illinois, 391 U.S. 510 (1968) 13

OTHER AUTHORITY:

Fla. Const., Art. I, Section 12 ..... 14, 16

Fla. Stat., Section 924.33 (1979) 17

U.S. Const., Amend. VI 7, 8, 13, 14

U.S. Const., Amend. XIV 7, 8, 13, 14, 17

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Telephone No. 904-353-3631

Attorney for Petitioner

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion rendered by the Supreme Court of Florida in the captioned matter on July 23, 1981, rehearing denied on October 15, 1981.

OPINION BELOW

The decision of the Supreme Court of Florida affirming the judgment of the Circuit Court of the Fourth Judicial Circuit of Florida is reported at 403 So.2d 936 (Fla. 1981), and is reprinted in Appendix A.

JURISDICTION

The decision of the Supreme Court of Florida was handed down July 23, 1981. A timely motion for rehearing was denied on October 15, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., amend VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., amend. XIV provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const., art. I, Section 12, provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

Fla. Stat., Section 924.33 (1979) provides:

No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

STATEMENT OF THE CASE

On February 18, 1976, the State of Florida charged Petitioner by indictment with murder in the first degree. Petitioner filed a motion to suppress tape recorded statements which the trial court denied on June 29, 1976.

The following evidence was presented to the jury at trial. Joe Richards was found dead in the bedroom of his home on January 27, 1976. Dr. John Legowik, the medical examiner, determined that death was instantaneously caused by multiple shotgun and rifle wounds. Detective Frank Japour of the Jacksonville Sheriff's Office testified that the shots were fired from a patio outside the deceased's bedroom window.

Barbara and Jerry Jones, the brother and sister-in-law of Petitioner, testified that they were at the Petitioner's house on the night of the shooting and that Petitioner returned to the house and told them, "It's over, he's dead." The Jones stated that Petitioner talked about the murder. Petitioner presented three witnesses who testified that they knew both Barbara and Jerry Jones and that they would not believe them under oath.

Two days after the shooting Barbara and Jerry Jones went to the F.B.I. and were placed in protective custody. On February 3, 1976, Jerry Jones allowed the F.B.I. and the Jacksonville Sheriff's Office to place a "bug" on him in order to monitor a conversation between Jones and Petitioner. The tape of this conversation was admitted into evidence over objection of Petitioner. The tape contained numerous incriminating statements by Petitioner.

Petitioner was arrested along with two other individuals, Bobby Lewis and Jimmy Carter, and

charged with murder in the first degree. The State granted Jimmy Carter immunity in exchange for his testimony. Jimmy Carter testified that he drove the van on the night of the shooting, dropped Lewis and Petitioner at the deceased's house, heard gunshots, then Petitioner and Lewis came back to the van. Carter said he drove the van onto a bridge and threw the rifle into the river and then drove Petitioner to his house.

During Petitioner's presentation of evidence, two witnesses testified that they were with Petitioner at Petitioner's house at the time of the shooting. Peggy Crapps testified that Jerry Jones, the key state witness, told her that he (Jerry Jones) had killed Joe Richards. Ronald Thompson testified that Jimmy Carter said Jerry Jones had killed Joe Richards. Other witnesses also testified that Jimmy Carter and Jerry Jones were the ones actually involved in the shooting.

At an in-chambers hearing during the trial, the court heard testimony regarding a threatening telephone call made to one of the jurors in this cause. Mr. Jones said that at 12:40 a.m. on the morning of August 24, 1976, he received a phone call at his home. An unidentified male voice threatened to kill him and his family if Eddie Odom were found not guilty. Mr. Jones testified that he was "scared" as a result of this phone call. He said he communicated this call to an alternate juror. Mr. Jones felt he could be a fair and impartial juror "as long as he won't mess with me, whoever it is." The alternate juror, Mr. Barker, said that Mr. Jones told him about the threatening phone call. The State moved to excuse Mr. Jones but then withdrew the motion.

Petitioner's counsel moved for a mistrial which was denied by the trial court. Mr. Jones, the juror who had received the threatening phone call, was

allowed to deliberate on Petitioner's case. The jury found Petitioner guilty and, after a sentencing hearing, recommended a life sentence. The court overruled the recommendation of life and imposed the death penalty.

In a motion for new trial, Petitioner asked the court to interview all the jurors to determine if any of the other jurors had received threatening phone calls. The court denied this motion.

On November 19, 1976, Petitioner filed a motion to interview jurors alleging new evidence of improper jury conduct and influence. The new evidence consisted of an affidavit executed by Nira Odom, wife of Petitioner. The affidavit contained the substance of a conversation between Ms. Odom and George Jones which occurred after the trial. After interviewing George Jones on November 24th, the trial court denied Petitioner's motion to interview jurors.

On November 5, 1976, Petitioner filed a notice of appeal to the Supreme Court of Florida pursuant to Article V, Section 3(b)(1), Florida Constitution. The following issues were among those presented to the appellate court:

I. The court erred in failing to grant a mistrial after interviewing juror, George Jones, concerning an alleged telephone threat to himself that he communicated to another juror.

II. The court erred in denying defense counsel's motion to interview all the jurors for the purpose of determining jury misconduct.

III. The court erred in admitting into evidence recorded conversations between the appellant and Jerry Jones and allowing those conversations to be played before the jury.

On July 23, 1981, the Supreme Court of Florida affirmed Petitioner's conviction but vacated the sentence of death and ordered that Petitioner be sentenced to life imprisonment without eligibility for parole for twenty five years. (Appendix A)

The Supreme Court of Florida ruled that the tape recording had been illegally obtained in violation of Article I, Section 12, Florida Constitution. It's admission into evidence was in violation of Florida's constitutionally enacted exclusionary rule. The court, however, refused to reverse Petitioner's conviction. The Supreme Court of Florida found that the trial court's actions concerning the threatened juror and the denial of Petitioner's motion to interview jurors were not an abuse of discretion. Petitioner's motion for rehearing argued that the Supreme Court of Florida had incorrectly applied established principles of law in refusing to reverse Petitioner's conviction. The court denied rehearing on October 15, 1981.

REASONS FOR GRANTING THE WRIT

I. The Trial Court's Refusal To Grant A Mistrial When One Of The Jurors Was Threatened With Death, And The Trial Court's Refusal To Grant Petitioner's Motion To Interview Jurors, Denied Petitioner His Right To An Impartial Jury Trial Under The Sixth And Fourteenth Amendments And His Right To Due Process Of Law Under The Fourteenth Amendment.

The right to jury trial guaranteed by the Sixth and Fourteenth Amendments "is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defen-

dants." *Duncan v. Louisiana,* 391 U.S. 145, 158, (1968). The Sixth Amendment's guarantee of trial by jury expressly means the right to an "impartial" trial by jury. *Singer v. United States,* 380 U.S. 24, 36 (1965). "It is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposely made." *Remmer v. United States,* 350 U.S. 377 (1956).

So fundamental is the right to jury trial to the American scheme of justice that this Court has not hesitated in the past to carefully scrutinize state practice to assure that the jury and jury process meets constitutional requirements. *Duren v. Missouri,* 439 U.S. 357 (1979); *Ballew v. Georgia,* 435 U.S. 223 (1978); and *Williams v. Florida,* 399 U.S. 78 (1970).

The trial court's refusal to declare a mistrial in the case *sub judice* when it became apparent that a juror's life had been threatened, and then allowing that juror to deliberate, undermined the very integrity of the jury's role in the criminal justice system. The trial court's subsequent failure to grant Petitioner's motion to interview jurors when additional evidence of improper jury conduct and influence came to light resulted in a denial of Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

During the trial, George Jones, one of the jurors, told a bailiff about receiving a threatening telephone call. The bailiff informed the court and the juror was interviewed in chambers by the court and counsel for both parties:

> *Mr. Jones*: About 20 minutes until 1:00, I received this phone call. I was asleep and I picked it up and I don't know, I didn't recall the voice, I don't know who it was. Anyway,

they said 'Are you George Jones, at 4742 Tawnview?' And I said, 'Yes, sir.' He said - he didn't tell me who he was, he said, 'If Eddie Odom is guilty, or not guilty, I will kill you and your family.' Now I don't know whether it's a prank somebody is trying to scare me or what. It scared me.

The Court: Is that the end of his conversation?

Mr. Jones: And he said, 'I will kill you, goddammit,' and that was the end and he hung up.

The Court: All right. Now, first of all, I want to know forthrightly from you if that phone call has affected your ability to act as an impartial juror?

Mr. Jones: Well it's got me scared because I sure don't want to die; that's for sure and my wife asked me who it was.

Upon further questioning by Mr. Willis, the prosecutor, Mr. Jones expressed his belief that the caller would kill him if the jury found Petitioner *not guilty*:

Mr. Willis: Did I understand you to say that if the verdict was either guilty or not guilty, you're going to die anyway?

Mr. Jones: In other words, see, I was half asleep when he called me, I wasn't really expecting a phone call. ... he said, 'If Eddie Odom is not guilty, I will kill you -' or vice versa, something...

Mr. Willis: If it's guilty or not guilty, he's still going to kill you?

Mr. Jones: In other words, I'm upset. I don't know, really?

Mr. Willis: Did he also say if he's guilty, I'm going to kill you?

Mr. Jones: No sir, I think it's the other way;

I'm not sure but he said I will get you and your family...

Mr. Jones further indicated that he communicated the fact of a threatening call to Mr. Barker, an alternate juror. The court interviewed Mr. Barker and verified this information. The State moved to excuse Mr. Jones but withdrew the motion. The court refused to declare a mistrial and ordered sequestration of the jury during the remainder of the trial.

"A presumption of prejudice arises when a juror in a criminal case receives a private communication bearing even remotely on the trial." *Gold v. United States,* 352 U.S. 985 (1957). A threat to a man's life when that man is a juror in a first degree murder trial where the State's chief witnesses have been in the protective custody of the F.B.I., and where tapes are played containing threats to the lives of certain individuals, is of such magnitude and character as to raise much more than a presumption of prejudice. Mr. Jones stated, "Well, it's got me scared, yes sir, because I shore (sic) don't want to die, that's for sure, and my wife asked me who it was." Mr. Jones was not certain as to his own state of mind: "I think I can do it (be impartial) as long as he won't mess with me, whoever it is; I don't know." "Would it be better if I get off the case or what?"

In his motion for new trial, Petitioner asked the trial court to conduct a hearing and to interview all the jurors individually to determine if they had received threats or if they new about the threat to George Jones. The court denied this motion. On November 19, 1976, Petitioner filed a motion to interview jurors accompanied by a supporting affidavit executed by Nira Odom, wife of the Petitioner, and a supporting polygraph examination.

In Nira Odom's affidavit she stated that she

talked with George Jones after the trial and he informed her that he had received a threatening call during the trial and that he had moved his wife to his mother's house as a result of the call. Ms. Odom also stated in her affidavit that George Jones told her the voice making the threatening call sounded like that of Jerry Jones, a key state witness. According to Ms. Odom, George Jones stated that he had discussed the case with other jurors prior to deliberation, that he had watched television and had read newspaper reports of the trial, and that other jurors had received threatening phone calls. At the time the court considered Petitioner's motion to interview jurors, in addition to the above information, the court had before it testimony that during sequestration the brother of one of the jurors, Mr. Adams, had been threatened, and that Nira Odom had been threatened.

The allegations of fact contained in Petitioner's motion to interview jurors and the presumption of prejudice raised by the motion were not rebutted by the court's very limited interview of George Jones on November 24th. When allegations of impartiality on the part of a juror or jurors comes to the attention of the trial judge, the court must give thorough and careful consideration to the matter. *United States v. Rowell,* 512 F.2d 766, 768 (8th Cir. 1975); See *Russ v. State,* 95 So.2d 594 (Fla. 1957).

In *Richardson v. United States,* 360 F.2d 366 (5th Cir. 1966), the court held that when an allegation of fact is presented in the form of a motion for new trial alleging that a key state witness engaged in a private conversation with one of the jurors, the allegation must stand as confessed unless a thorough hearing is conducted. "Prejudice will be assumed in the form of a rebuttable presumption." 360 F.2d at 369 (citations omitted).

In *Morgan v. United States*, 380 F.2d 915 (5th Cir. 1967), the defendant's motion for new trial alleged an improper conversation between a juror and a non-juror. The trial judge, after examining each of the members of the jury separately, denied the motion for new trial and filed finding of fact explaining the denial. The Fifth Circuit concluded that the findings of fact were not specific enough to allow meaningful appellate review, and vacated the denial of the motion and remanded for additional findings of fact.

In *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970), the Fifth Circuit reviewed the *Morgan* and *Richardson* cases discussed above in addition to *Remmer v. United States*, 347 U.S. 227 (1954), and announced the following:

> Implicit in these cases is the assumption that when jury miscondict is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: he must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review.

Id. 429 F.2d at 1026.

In *Remmer v. United States*, 350 U.S. 377 (1956), the Supreme Court of the United States remanded the case to the trial court for a new trial after concluding that the hearing held pursuant to the first remand "... reveals such a state of facts that neither (the juror) nor anyone else could say that he was not affected to his freedom of action as a juror."

This court has held that the *proper functioning of a jury* is even more important to the American system of justice than the right to a jury trial itself. *Brown v. Louisiana,* _____ U.S. _____, 100 S. Ct. 2214, 2223 N. 13 (1980); See *Witherspoon v. Illinois,* 391 U.S. 510, 523 n.22 (1968).

Independent of Sixth Amendment considerations, due process also guarantees a defendant an impartial jury. *Ristaino v. Ross,* 424 U.S. 589, 96 S. Ct. 1017, 1020 n.6 (1976). In *Turner v. Louisiana,* 379 U.S. 472 (1965), this Court considered the question of the nature of the jury trial demanded by the Fourteenth Amendment once trial by jury has been accorded by the State:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. In re *Oliver,* 333 U.S. 257, 68 S. Ct. 499, 92 L.Ed. 682; *Tumey v. State of Ohio,* 273 U.S. 510, 47 S. Ct. 437, 71 L.Ed. 749. 'A fair trial in a fair tribunal is a basic requirement of due process.' In re *Murchison,* 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke a juror must be as 'indifferent as he stands unsworne.' Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville,* 362 U.S. 199, 80 S. Ct. 624, 4 L.Ed. 2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief

Justice Marshall in 1 Burr's Trial 416 * * *."
366 U.S., at 722, 81 S. Ct., at 1642

Id. 379 U.S. at 471-72.

The actions of the trial court in the case *sub judice,* conflicts with established federal case law and undermines the very basis of the proper functioning of the jury under the Sixth and Fourteenth Amendments.

II. The Supreme Court of Florida's Refusal To Reverse Petitioner's Conviction Based On Evidence Admitted In Violation Of The Florida Constitution Violated Petitioner's Rights Under The Due Process And Equal Protection Clauses Of The Fourteenth Amendment.

A. Due Process Considerations

The Supreme Court of Florida ruled that the tape recording admitted into evidence was illegally obtained in violation of Article I, Section 12 of the Florida Constitution. Under Florida's constitutional exclusionary rule, the court ruled that the admission of the tape into evidence was error. However, the court refused to reverse Petitioner's conviction.

The Supreme Court of Florida's decision was based upon state constitutional provisions and not upon federal constitutional grounds. *State v. Sarmiento,* 397 So.2d 643 (Fla. 1981). The court in *Sarmiento* stated that the state constitution can provide greater protection for its citizens than the federal constitution: "the citizens of Florida, through their state constitution, may provide themselves with more protection from government intrusion than that afforded by the United States Constitution." 397 So.2d at 645.

Florida may not be required to provide greater privacy protection to its citizens than what is provided

by the Fourth Amendment, but it has chosen to do so. Florida has also elected to elevate the exclusionary rule to constitutional status. Once a state confers a substantial right upon its citizens, the application of the right will be enforced according to principles of fundamental fairness. See *Griffin v. Illinois,* 351 U.S. 12 (1956).

Admission of the tapes into evidence in violation of the state constitution constitutes a denial of due process of law. The right of an accused in a criminal trial to due process is the right to a fair opportunity to defend against the state's accusation. *Chambers v. Mississippi,* 410 U.S. 284 (1973). Finding a violation under the due process clause requires that the error "so infected" the entire trial that the resulting conviction violates due process. *Cupp v. Naughten,* 414 U.S. 141, 147 (1973).

In the case *sub judice,* besides the tape, the primary evidence implicating Petitioner consisted of the testimony of Jimmy Carter, who testified in exchange for immunity on the charge of first degree murder, and the testimony of Jerry and Barbara Jones, two individuals who had bad reputations for truth and veracity. Jerry Jones had two felony charges pending against him when he initially contacted the F.B.I. Additionally, Peggy Crapps testified that Jerry Jones had told her he (Jerry Jones) had killed Joe Richards. Other witnesses testified that both Jerry Jones and Jimmy Carter were the ones actually involved in the killing.

The tape recording improperly admitted into evidence contained the actual voice of Petitioner making incriminating statements. This is tantamount to a taped confession being played before the jury. The effects of this tape were clearly devastating. Admission of the tape under these circumstances could never be harmless error.

B. Equal Protection Considerations

In *State v. Sarmiento,* 397 So.2d 643 (Fla. 1981), the Supreme Court of Florida held that warrantless, electronic interception by state agents of a conversation between the defendant and an undercover police officer in defendant's home is an unreasonable interception of defendant's private communication in violation of Article I, Section 12, Florida Constitution. The court reversed defendant's conviction because evidence resulting from the warrantless interception was admitted at the defendant's trial. The Supreme Court of Florida emphasized the importance of enforcing this constitutional provision to protect the rights of all citizens. 397 So.2d at 645.

In *Hoberman v. State,* 400 So.2d 758 (Fla. April 30, 1981), the Supreme Court of Florida demonstrated that violations of the constitutional right of privacy under Article I, Section 12, Florida Constitution, would result in reversal. Hoberman was convicted of bribery and unlawful compensation for official behavior. Warrantless tape recordings of private incriminating conversations between Hoberman and a state agent were admitted into evidence in violation of Article I, Section 12, Florida Constitution. The Supreme Court of Florida reversed Hoberman's conviction even though the state agent properly testified as to the contents of the recordings and would be allowed, upon retrial, to testify again about the contents of the tapes.

The principles announced in *State v. Sarmiento,* 397 So.2d 643 (Fla. 1981), and *Hoberman v. State,* 400 So.2d 758 (Fla. April 30, 1981), have not been equally applied to Petitioner. As discussed above under the due process analysis, the introduction of the tapes had a prejudicial and devasting effect on

Petitioner at trial. However, the Supreme Court of Florida, departing momentarily from *Sarmiento* and *Hoberman,* refuse to reverse Petitioner's conviction. The "fundamental task of the judiciary" to "safeguard the constitutional rights of the citizenry," 397 So.2d at 645, has not been accorded Petitioner by the Supreme Court of Florida.

Florida's "reversible error" statute requires reversal when there has been a violation of a substantial right protected by state law. *Fla. Stat.*, § 924.33 (1979). Even with this statute to guide the judgment of the Supreme Court of Florida in addition to the constitutional principles announced in *Sarmiento,* the court still refused to reverse Petitioner's conviction.

The Fourteenth Amendment's equal protection clause provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." As demonstrated by the case *sub judice,* the Supreme Court of Florida is applying a lesser standard of appellate review to capital cases than it does to criminal non-capital cases.

A careful review of a sampling of capital cases reviewed by the Supreme Court of Florida in the past year supports this conclusion. *Perry v. State,* 395 So.2d 170 (Fla. 1981) (a new trial is not required by newly discovered impeachment evidence of a key state witness); *Demps v. State,* 395 So.2d 501 (Fla. 1981) (restriction of cross-examination of key state witness is not reversible error); *Knight v. State,* 394 So.2d 997 (Fla. 1981) (failure to instruct on underlying felony in felony murder not reversible error); *Jacobs v. State,* 396 So.2d 1113 (Fla. 1981) (failure to instruct that intoxication may negate specific intent is not error); *Palmes v. State,* 397 So.2d 648 (Fla. 1981) (exclusion of testimony concerning circumstances of confession to

show state of mind is harmless error); *Straight v. State*, 397 So.2d 903 (Fla. 1981) (cross-examination of the defendant relative to unrelated criminal activity highly improper but reversal not required because the question was not answered).

It is apparent from the case *sub judice* and from other capital cases in Florida, that the Supreme Court of Florida has developed a pattern of invidious discrimination in reviewing capital cases.

CONCLUSION

Based upon the preceding arguments and citations of authority, Petitioner respectfully requests that this Court direct a Writ of Certiorari to the Supreme Court of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petition For a Writ of Certiorari to the Supreme Court of Florida have been furnished by United States Mail to The Attorney General, The Capitol, Tallahassee, Florida, this _____ day of December, 1981, to the following:

WILLIAMS AND STAPP
BY:_____
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Appendix

APPENDIX A

EDDIE ODOM, Appellant,

v.

STATE OF FLORIDA, Appellee,

No. 50575.

Supreme Court of Florida.

July 23, 1981.

Rehearing Denied Oct. 15, 1981.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Fourth Judicial Circuit, Duval County. In a jury trial, appellant was convicted of murder in the first degree. The court imposed a sentence of death. This Court has jurisdiction of the appeal. Art. V, § 3(b)(1), Fla.Const.

Appellant presents several contentions of reversible trial error. For reasons to be discussed below, we find them to be without merit. Furthermore, the verdict is supported by the evidence. There being no reversible error going to the conviction of murder in the first degree, we affirm it. Finding that the state failed to establish any statutory aggravating circumstances, however, we hold that the sentencing court should have adopted the jury's recommendation of life imprisonment. We vacate the sentence of death and order that appellant be sentenced to life imprisonment without eligibility for parole for twenty-five years.

I. FACTS

[1] On January 27, 1976, Joe Richards went to

Eddie Odom's home and made threats to Nira Gail Odom, appellant's wife. She called the police. Odom, who had been absent, came home and then police officers arrived. While the police were there, Richards telephoned Odom. The police officers listened on an extension phone as Richards claimed that appellant owed him money and threatened to kill him if he did not pay. That night, Odom, Robert Lewis, and Charles Jimmy Carter went to Richards' home. Carter waited in a van while Odom and Lewis went to a bedroom window of the house and shot Richards, instantly causing his death. Two women were in the room with Richards. One of them sustained a minor shotgun wound.

Charles Jimmy Carter, originally arrested on a charge of first-degree murder, was given immunity and testified that he drove the van to Richards' house with Odom and Lewis as his passengers. Odom and Lewis, he said, armed with a .30-.30 rifle and a shotgun respectively, went up to the house. Carter testified that he then heard gunshots, after which Odom and Lewis came running back to the van. They got in, and he drove to a bridge over the Trout River. He threw the rifle over the side of the bridge. Carter said that he participated in the killing because he, like Odom and Lewis, mortally feared Joe Richards.

Barbara Jones, sister of Nira Gail Odom, testified that she was at the Odom home on January 27 and heard Richards' threats. She testified that that afternoon, Odom borrowed a .30-.30 rifle from her nephew, Michael Hilliard. She was also there at 10:00 p.m. that night when appellant came in saying, "It's over. He's dead." Barbara Jones testified that Odom then talked in detail about the shooting.

Barbara Jones' husband Gerald Jones testified that he, too, was present and heard appellant admit

his participation in the murder. Gerald and Barbara Jones contacted the authorities, they said, because they felt they were in danger from Lewis and Carter on account of their knowledge of the crime. Subsequently Gerald Jones, in cooperation with police, wore a hidden transmitter and engaged Odom in a conversation in which he made incriminating statements which the police recorded. The recording was admitted in evidence and Jones testified about the contents of the recorded conversation.

Police recovered a .30-.30 rifle from the Trout River. Michael Hilliard identified it as the one he gave to Odom. Several months before the crime, the rifle had been fired in a wooded area. Police recovered a spent .30-.30 casing from the place where the rifle had been fired. Three casings were found at the scene of the murder. One casing was found in the rifle recovered from the river. A ballistics expert testified that all five were fired by the same weapon. The expert stated further that because of corrosion he was unable to determine whether the rifle recovered from the river was that weapon.

We conclude from our review of the record that the verdict of guilt was supported by competent, substantial evidence.

II. ISSUES ON APPEAL OF THE JUDGMENT OF CONVICTION

A.

[2,3] Odom argues that the court should not have admitted into evidence the tape recording of his conversations with Gerald Jones. Although we rule that the tape was improper evidence, we do not reach this conclusion on any of the grounds argued by appellant. In support of his motion to suppress the

tape, he argued that admission would violate his rights under the Fourth and Fifth Amendments to the United States Constitution. These contentions are without merit. When Jones visited Odom and engaged him in conversation, there was no compulsion used. Odom's statements were purely voluntary. In order for the right against self-incrimination to be involved when statements are made, there must at least be some kind of compulsion. In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), cited by appellant, it was held that there is compulsion inherent in custodial interrogation. Here there was no compulsion, so appellant's Fifth Amendment rights were not violated. See *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

[4,5] Having heard the appellant voluntarily make statements of an incriminating nature concerning his participation in the crime, Jones clearly could have testified from memory about the content of the statements. The Fourth Amendment does not protect a person from the possibility that one in whom he confides will violate the confidence. *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). If this is so, then there is no bar under the United States Constitution to the introduction of more reliable and perhaps more credible evidence — recordings made by the informer or agent to whom the statements are made. *United States v. Caceres,* 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Lopez v. United States,* 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963).

Appellant also argues that the admission of the tape into evidence violated chapter 934, Florida Statutes (1975). Under the statute as written this argument is without merit. In enacting chapter 934,

the legislature did not give article I, section 12, Florida Constitution, the interpretation we give it today. Thus the legislature did not intend to require a court order for the interception of wire or oral communications when one of the parties to the communication consents to the interception. § 934.01(4), Fla.Stat. (1975). Chapter 934 declares that it is lawful.

> for a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

§ 934.03(2)(c) Fla.Stat. (1975). Since the tape in question was made by way of the cooperation of Mr. Jones acting under the direction of law enforcement officers, the interception did not violate chapter 934, and was admissible evidence as far as the statute is concerned. See § 934.06, Fla.Sta. (1975).

[6] We find, however, that the admission of the tape into evidence was error under the constitutional rule excluding evidence obtained in violation of article I, section 12 of the Florida Constitution. That section of our Declaration of Rights provides:

> SECTION 12. Searches and seizures. — The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be in-

> tercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

In *State v. Sarmiento*, 397 So.2d 643 (Fla. 1981), we held that the warrantless electronic monitoring by state agents of a conversation between the accused and an undercover police officer was an unreasonable interception of a private communication in violation of article I, section 12. Based on this principle, we held that the trial court should have excluded the testimony of police officers who, without obtaining an interception warrant, listened to the conversation by means of an electronic transmitter concealed on the person of the undercover agent. Applying the same principle to the present case, we find that the warrantless recording of the conversation between appellant and witness Jones was an unreasonable interception.

[7] Evidence obtained in violation of article I, section 12 is inadmissible in Florida courts. *Sing v. Wainwright*, 148 So.2d 19 (Fla. 1962); *Gildrie v. State*, 94 Fla. 134, 113 So. 704 (1927): This constitutional principle applies regardless of whether the evidence in question was obtained in violation of the Fourth Amendment, and regardless of the scope of the Fourth Amendment exclusionary rule. *Taylor v. State*, 355 So.2d 180 (Fla.3d DCA 1978).

The evidence, therefore, should have been excluded. The admission of the tape into evidence, however, does not require reversal of the judgment. There was other evidence of appellant's guilt sufficient to support the jury's verdict. The improperly obtained evidence was merely cumulative. The error of allowing such evidence to go to the jury was harmless.

B.

Appellant also contends that the tape of the conversation was so inaudible and unintelligible that it should not have been admitted in evidence. We have already held the admission of the tape error, but harmless because of independent evidence. The partial inaudibility of the tape, which was merely cumulative evidence, did not prejudice the defendant.

[8,9] The trial court ruled that the inaudible and unintelligible portions of the tape were not so substantial as to deprive the remainder of relevance. Partial inaudibility or unintelligibility is not a ground for excluding a recording if the audible parts are relevant, authenticated, and otherwise properly admissible. *Todisco v. United States,* 298 F.2d 208 (5th Cir. 1961), *cert. denied,* 368 U.S. 989, 82 S.Ct. 602, 7 L.Ed.2d 527 (1962); *Monroe v. United States,* 234 F.2d 49 (D.C.Cir.), *cert. denied,* 352 U.S. 873, 77 S.Ct. 94, 1 L.Ed.2d 76 (1956); *Brady v. State,* 178 So.2d 121 (Fla.2d DCA 1965); *Gomien v. State,* 172 So.2d 511 (Fla.3d DCA 1965). Although the tape was improper under the interpretation of "unreasonable interception" that we provided in Sarmiento, it was not so viewed at the time of the trial. So, the trial court evaluated appellant's inaudibility objection according to the above-stated standard. The question of whether the recordings were admissible under this standard was for the trial judge. Appellant has not shown that the court's ruling on the inaudibility objection was error.

C.

Appellant next argues that the judge erred when he allowed the state crime laboratory's ballistics expert to testify after learning of his conversation with a local officer. In this conversation the local officer, a

friend of the witness, gave his opinion of the nature of the case and the character of defendant Eddie Odom. He expressed the hope that the jury would convict. He indicated his opinion that the victim was a dangerous criminal and that with a "good verdict" on appellant, there would be two bad characters "off the street." The defense, after the court's inquiry into the circumstances of this conversation, moved for a mistrial and moved to have the ballistics expert's testimony excluded. The court ruled that if the expert's testimony were confined to matters contained in his written report prepared before trial, there would be no possibility of bias coloring his testimony, and allowed the witness to testify with this condition. If the witness had colored his testimony, he could have been impeached by his own report.

[10] The purpose of the rule of sequestration of witnesses "is to avoid the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand." *Spencer v. State*, 133 So.2d 729, 731 (Fla. 1961), *cert. denied*, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962). Seen in this light, the incident in question was not even a violation of the rule. The harm that an event such as the incident in question might cause to the fairness of a trial would be just as readily caused by a witness who is prejudiced against the defendant but who has no contact with another witness or with anyone at all during the trial. The defendant's remedy in such a case is to try to disqualify the witness for interest or to impeach his credibility. The appellant made no attempt to present the circumstances and content of the conversation to the jury. Perhaps defense counsel thought that to do so would have the effect of harming the defendant rather than impeaching the witness.

[11] Assuming, however, that there was a violation of the rule, the question that then arose before the curt below was how to remedy it. This was a matter for the court's discretion. *Rollins v. State*, 256 So.2d 541 (Fla.4th DCA 1972). The court made an inquiry into the circumstances of the conversation and issued a ruling which we find to have been not only within the range of discretion, but eminently fair and reasonable.

D.

[12] Appellant contends that the trial judge should have granted his motion for a mistrial after he learned that a juror had received a threatening telephone call and had told one of the alternate jurors about it. The juror told a bailiff about the call and the bailiff informed the court. The jurors were interviewed in chambers by the court and counsel for both parties. The juror who received the threatening phone call testified that the caller did not make clear to him what kind of result was desired. The juror did not know which way the threat went. Therefore he did not know what kind of action on his part would keep him free of the threatened harm. The juror said that although he was frightened by the call, he could still be a fair and impartial juror. The alternate juror knew only that the other juror had received some kind of threat. He did not learn the details of the call. He said he could still be a fair and impartial juror. Following the report of and inquiry into this incident, the court ordered the jury sequestered.

The motion for a mistrial was addressed to the sound discretion of the court and we are unable to conclude that the court's response to the incident was an abuse of discretion.

E.

[13] Appellant contends that the court erred in denying his post-trial motion for interviews of all the jurors based on his suggestion of jury misconduct. The motion, supported by the affidavit of Nira Gail Odom, appellant's wife, was filed after the motion for new trial had already been heard and the notice of appeal filed. Nevertheless, the court made inquiry into the possibility that jurors had disregarded the court's instructions and had been influenced by improper considerations. Mrs. Odom's affidavit declared that she learned of the jury misconduct from a juror, the same juror who received the threatening telephone call. The judge called in the juror, who disputed the factual assertions of Mrs. Odom's affidavit. Then the court denied the appellant's request for interviews with the other jurors.

The court evaluated the conflicting evidence and determined that there was no basis for further inquiry. The motion was a matter for the sound discretion of the court and we see no basis for finding an abuse of that discretion. See also, *Lamb v. State,* 90 Fla. 844, 107 So. 530 (1925); *Yates v. State,* 26 Fla. 484, 7 So. 880 (1890).

III. SENTENCE

We come now to the question of sentencing. The trial judge found two aggravating circumstances — that in committing the capital felony the appellant had created a great risk of death to many persons, section 921.141(5)(c), Florida Statutes (1975), and that the murder was especially heinous, atrocious, or cruel. *Id.* § 921.141(5(h).

[14,15] The court based the finding of great risk of death to many persons on the fact that two women were present in the victim's bedroom at the time of the

shooting. The presence of two persons in immediate proximity to the victim of a murder by shooting is, as a matter of law, insufficient to establish this aggravating circumstance. *Williams v. State,* 386 So.2d 538 (Fla. 1980); *Lewis v. State,* 377 So.2d 640 (Fla. 1979); *Kampff v. State,* 371 So.2d 1007 (Fla. 1979). Therefore this finding is erroneous.

[16,17] The trial judge based his finding that the murder was especially heinous, atrocious, or cruel on the fact that the killing was accomplished through a "vicious onslaught" which shattered the victim's skull. An instantaneous death caused by gunfire, however, is not ordinarily a heinous killing. *Lewis v. State,* 377 So.2d 640 (Fla.1979); *Cooper v. State,* 336 So.2d 1133 (Fla.1976), *cert. denied,* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). This finding too was erroneous.

[18,19] The trial judge's written sentencing findings state that he considered appellant's prior record, including numerous arrests and charges which did not culminate in criminal convictions. This court has held that aggravating considerations must be limited to those provided for by the statute, and information must relate to one of the statutory aggravating circumstances in order to be considered in aggravation. Evidence of past criminality, offered by the state for the purpose of aggravating the crime, is inadmissible unless it tends to establish one of the aggravating circumstances listed in section 921.-141(5). Therefore, consideration of mere arrests and accusations as aggravating circumstances is precluded. *Perry v. State,* 395 So.2d 170 (Fla.1980); *Provence v. State,* 337 So.2d 783 (Fla.1976), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

[20,21] The jury recommended a sentence of life

imprisonment. Because it represents the judgment of the community as to whether the death penalty is appropriate, the jury's recommendation is entitled to great weight. For the court to overrule the recommendation of the jury, the facts justifying the death sentence must be so clear that the jury can be said to have acted unreasonably. *Neary v. State,* 384 So.2d 881 (Fla.1980); *McCaskill v. State,* 344 So.2d 1276 (Fla.1977); *Tedder v. State,* 322 So.2d 908 (Fla.1975).

Improper factors were relied upon to aggravate the crime, and no statutory aggravating circumstances were established. The jury recommended life. We therefore vacate the sentence of death and order that appellant be sentenced to life imprisonment without eligibility for parole for twenty-five years.

It is so ordered.

SUNDBERG, C.J., and BOYD, OVERTON and ENGLAND, JJ., concur.

ADKINS, J., concurs as to conviction, and dissents as to sentence.

Opposition

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1113

EDDIE ODOM,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to
The Supreme Court of Florida

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL WHEN ONE OF THE JURORS WAS THREATENED WITH DEATH, AND THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER'S MOTION TO INTERVIEW JURORS, DENIED PETITIONER HIS RIGHT TO AN IMPARTIAL JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

THE FLORIDA SUPREME COURT'S REFUSAL TO REVERSE PETITIONER'S CONVICTION BASED ON EVIDENCE ADMITTED IN VIOLATION OF THE FLORIDA CONSTITUTION VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED	2
QUESTION I	3
QUESTION II	12
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Beck v. Washington, 369 U.S. 541 (1962)	14
California v. Krivda, 409 U.S. 33 (1972)	13
Delia v. Court of Common Pleas of Cuyahoga County, 418 F.2d 205 (6th Cir.1969)	15
Frazier v. Cupp, 394 U.S. 731 (1969)	5
Hoberman v. State, 400 So.2d 758 (Fla.1981)	15,16
Hoffa v. United States, 385 U.S. 293 (1966)	12
Milton v. Wainwright, 407 U.S. 371 (1972)	17
Milwaukee Electric Railway & Light Co. v. Wisconsin, 252 U.S. 100 (1920)	14
Padgett v. State, 404 So.2d 151 (Fla.1st DCA 1981)	15
Payton v. New York, 445 U.S. 573 (1980)	16
Pittman v. State 397 So.2d 1205 (Fla.1st DCA 1981)	15
Remmer v. United States, 347 U.S. 227 (1954)	6

	Page
Smith v. Phillips, ___ U.S. ___, ___ L.Ed.2d ___ (1982), Case No. 80-1082, Opinion filed January 25, 1982	7,11
State v. Sarmiento, 397 So.2d 643 (Fla.1981)	15,16
United States v. Coceres, 440 U.S. 741 (1979)	12
United States v. Flynn, 216 F.2d 354 (2d Cir.1954), *cert.denied*, 348 U.S. 909	5,6
United States v. Santana, 427 U.S. 38 (1976)	16
United States v. White, 401 U.S. 745 (1971)	12
Wainwright v. Stone, 414 U.S. 21 (1973)	13

STATUTES

	Page
28 U.S.C. §1257(3)	1,12, 18
§924.33, Fla.Stat.	16

OPINION BELOW

The decision of the Florida Supreme Court which is sought to be reviewed is reported at 403 So.2d 936 (Fla.1981).

JURISDICTION

To the extent that Petitioner has established the existence of a substantial federal question this Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees the constitutional provisions and statutes relevant to this cause are those stated by Petitioner on pages two and three of the Brief of Petitioner.

STATEMENT OF THE CASE

The facts and circumstances of this case, in addition to those stated by Petitioner,

may be found in the opinion of the Florida Supreme Court. See: Petitioner's Appendix at A-1 thruogh A-3. Additional facts which Respondent deems relevant to disposition of the petition filed herein and overlooked by Petitioner are included in the argument portion of this brief.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I

THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL WHEN ONE OF THE JURORS WAS THREATENED WITH DEATH, AND THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER'S MOTION TO INTERVIEW JURORS, DENIED PETITIONER HIS RIGHT TO AN IMPARTIAL JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

Petitioner asserts that this Court should accept jurisdiction in this case because the trial judge deprived him of a fair trial when he failed to grant a *mistrial* after learning that Juror Jones received a threatening phone call and this was communicated to an *alternate* juror. Respondent submits that counsel's argument is absolutely devoid of any merit and that no substantial question is presented under this claim.

Petitioner has neglected to point out that Juror George Jones was questioned by

both the attorney for the defense and the prosecution, and his uncontradicted testimony was that none of the other jurors were told about the phone call to Mr. Jones. This was corroborated by Mr. Barker. More importantly, what counsel has not informed this Court is that when trial counsel for Petitioner asked for a mistrial *after* asking that the jury be sequestered, the trial judge inquired of counsel:

THE COURT: Is there any request to excuse him?

MR. MATTOX: No, Sir.

THE COURT: Or that his place be taken by an alternate?

MR. MATTOX: No, Sir.

* * *

THE COURT: But you don't want to move to have him replaced by an alternate?

MR. MATTOX: No, Sir.

THE COURT: The motion for mistrial is denied. We will go on with the jury we have. Let's go. (TT 883)

Since there were two alternates and only Mr. Jones and Mr. Barker were aware of the call, it was not "manifestly necessary" to grant a mistrial in order to have assured Petitioner a fair and impartial trial by jury. *United States v. Flynn*, 216 F.2d 354 (2d Cir.1954), *cert.denied*,348 U.S. 909 (1955). George Jones could have been substituted by the other alternate juror! *That is precisely why alternate jurors are used in criminal trials!*

Petitioner does not have a constitutional right to the declaration of a mistrial—indeed, mistrials are to be avoided except in the most extreme circumstances. *Frazier v. Cupp*, 394 U.S. 731 (1969). That is, a mistrial should only be declared where it is manifestly necessary to insure the defendant a fair trial by an impartial jury. Had Mr. Jones been replaced by the other available alternate juror, which was offered

to him by the trial judge, there would be no question that Petitioner would have had a jury that had no knowledge whatsoever of the telephone call. Petitioner's attorney *elected* not to have the juror replaced. He cannot now be heard to complain that this juror participated in the deliberations which led to the guilty verdict.

While Petitioner was extended the right to a substitution of Juror Jones for the reasons stated in *Remmer v. United States*, 347 U.S. 227 (1954), he was not entitled to a *mistrial* because that juror received a telephone call with undefined overtones, because it was unnecessary to insure a fair trial. *United States v. Flynn, supra.*

Additionally, Mr. Jones, after unlimited questioning by counsel for the parties, stated he could render a fair and impartial verdict in the cause. That testimony rebutted any presumption of prejudice and

there is nothing to reflect this witness was biased against Petitioner. The Florida Supreme Court so held, 403 So.2d at 936, and the finding is amply supported by the record. *Smith v. Phillips*, ___ U.S. ___, ___ L.Ed.2d ___ (1982), Case No. 80-1082, Opinion filed January 25, 1982.

Petitioner's claim that a substantial federal question is presented by the Florida Supreme Court's affirmance of the order denying his motion for new trial is likewise without merit.

After the trial was concluded, Nira Odom, Petitioner's wife telephoned George Jones, the juror who was threatened during the trial. According to her sworn *ex parte* affidavit, which supported the motion to interview:

> On August 26, 1976, I called Mr. George Jones after Eddie Odom was convicted. During the course of conversation, he told me that he and his wife had received threatening phone calls, saying that they were going to cut his wife's throat and kill his family. After he received these calls he said that he moved his wife to a safer place, she was all the family he had. The reason he was scared was because they quoted his address to him over the phone. So, then he wanted to know if this conversation was being taped; I told him, 'No.' I also asked him questions about the trial. I asked him if he discussed the trial with anyone. He said he did with the other jurors. I also asked if any other jurors received threatening phone calls, and he said, 'Yes.' At one point he said he thought that Jerry Jones made the threatening calls. He also told me that he watched TV, read the papers, and they talked amongst themselves. He talked with the substitute about the threats that he received. I also asked him what was the most damaging part of the trial, and he said the tapes were, but he couldn't understand them at all, he only understood what they said because Jerry Jones got up and explained what the tapes said. (R 38)

The motion to interview also included an *unsworn* polygraph examination report purportedly signed by J. Donald Jones, a

polygraphist, who opined that the allegations contained in Mrs. Odom's affidavit were true. The trial judge, after hearing the argument of counsel on the motion on November 22, 1976, ordered that Mr. Jones be brought before the court to give further testimony.

Mr. Jones appeared before the court on November 24, 1976, and admitted that Petitioner's wife called him and talked to him about the threat. Mr. Jones, however, denied the allegations contained in Nira Odom's affidavit. He denied that he told her he talked to other jurors about the earlier threat; that he told her the jurors watched television, read newspapers and talked about the case among themselves; and that he told her the tape recording was the most damaging part of the trial.

Petitioner did not produce Mrs. Odom as a witness at this hearing. Indeed, he didn't

even ask the trial judge if she could appear and testify in open court, where she would be subject to cross-examination. During the trial of this cause Nira Odom was not called as a witness after the trial judge ruled she could not selectively invoke the Fifth Amendment to avoid being cross-examined by the State. After hearing the testimony of Mr. Jones, the trial judge entered an order denying Petitioner's motion specifically finding there was ". . . no evidence of any improper conduct on the part of any of the jurors. . . ."

While Mrs. Odom's *ex parte* affidavit and the motion were sufficient to require the trial judge to conduct a hearing, after hearing the uncontradicted testimony of Mr. Jones, who was subject to cross-examination, he was not required to interview the other jurors. Mrs. Odom supposedly knew the things alleged in her affidavit because

Jones told her—but Jones testified they did not occur. The trial judge found Jones was credible because he was not impeached and his testimony was uncontradicted since Petitioner did not produce his mother at the hearing.

Petitioner's reliance upon cases which require a hearing be accorded where misconduct is alleged have no application herein because a fair hearing was conducted. Moreover, the so-called presumed bias and prejudice concept relied on by Petitioner has been repudiated by this Court in *Smith v. Phillips, supra,* slip opinion at p. 6-8.

This issue presents no substantial federal question which merits further review by this Court.

II

THE FLORIDA SUPREME COURT'S REFUSAL TO REVERSE PETITIONER'S CONVICTION BASED ON EVIDENCE ADMITTED IN VIOLATION OF THE FLORIDA CONSTITUTION VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Respondent respectfully submits that this issue clearly fails to state a federal question as required by 28 U.S.C. §1257(3). As the opinion of the Florida Supreme Court reflects—*which is unchallenged by Petitioner* herein—the tape recording of the conversation between him and Gerald Jones did not violate any provision of the Federal Constitution as construed by this Court. *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971) and *United States v. Coceres*, 440 U.S. 741 (1979).

Counsel, obviously aware of the fact that the Florida Supreme Court is free to interpret the State Constitution more narrowly than similar provisions of the Federal Constitution and that such interpretation is binding on this Court, *Wainwright v. Stone*, 414 U.S. 21 (1973), has attempted to establish jurisdiction by contending that the Florida Supreme Court denied him equal protection of the law and due process by refusing to find the violation of the *state* constitutional right was prejudicial error.

Respondent submits the application or misapplication of state law simply does not present a federal question, *California v. Krivda*, 409 U.S. 33 (1972), and the fact that the Court reaches different results under similar factual circumstances does *not* establish a denial of due process or equal protection under the Fourteenth

Amendment to the Federal Constitution. *Milwaukee Electric Railway & Light Co. v. Wisconsin,* 252 U.S. 100 (1920) and *Beck v. Washington,* 369 U.S. 541 (1962).

In *Beck, supra,* the petitioner specifically alleged a misapplication of state law—the claim presented herein—denied him equal protection of the law guaranteed by the Constitution. This Court, citing to *Milwaukee Electric, supra,* said:

> . . . petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error.

369 U.S. at 555

In other words, the mere fact that a tribunal reaches different conclusions in two different cases does not establish a denial of equal protection, unless there is shown

an element of intentional or purposeful discrimination. *Delia v. Court of Common Pleas of Cuyahoga County*, 418 F.2d 205 (6th Cir.1969).

Respondent respectfully submits that the instant case is nowhere remotely similar to either *State v. Sarmiento*, 397 So. 2d 643 (Fla.1981) or *Hoberman v. State*, 400 So.2d 758 (Fla.1981) for in this case statements made by Respondent outside the home in his backyard were more incriminatory than any said while he was inside the house. The courts of Florida, consistent with the explicit language contained in *Sarmiento*, have held that recordings of conversations made outside the home are admissible in evidence under the Flroida Constitution. *Pittman v. State*, 397 So. 2d 1205 (Fla.1st DCA 1981) and *Padgett v. State*, 404 So.2d 151 (Fla.1st DCA 1981). Of course, expectation of privacy while

in the home is greater than without. See and compare *Payton v. New York*, 445 U.S. 573 (1980) with *United States v. Santana*, 427 U.S. 38 (1976). In *Sarmiento* and *Hoberman*, all of the conversations recorded took place within the home. Moreover, there was no independent corroboration of the informant's testimony in either *Sarmiento* or *Hoberman* whereas in the instant case Barbara Jones testified that Petitioner told him that he committed the homicide. See opinion at p. 938; Pet. at p. 4.

The above amply demonstrates that the Florida Supreme Court found under the facts and circumstances of this case the admission of the evidence obtained in violation of the Florida Constitution was not prejudicial error under Section 924.33, Florida Statutes. There is not one iota of evidence that this judgment was predicated

upon some invidious desire to discriminate against Petitioner. The only indication is that the court, when viewing all of the evidence, concluded that the jury would have reached the same verdict without hearing the tape recording of conversations which occurred within Petitioner's home. See: *Milton v. Wainwright*, 407 U.S. 371, 377 (1972).

Petitioner has failed to demonstrate the existence of a *federal* question and is merely attempting to have this Court review his case to determine whether the Florida Supreme Court properly applied *state* law questions. He has not cited and cannot cite to any decision of this Court where it has assumed jurisdiction for such purposes. Indeed, to do so would enlarge the jurisdiction of this Court to resolve what facially appears to be conflicts among decisions of every state supreme court in

the application of state law. Understanding Petitioner's jurisdictional theory adequately answers the question of whether this Court has jurisdiction!

CONCLUSION

Petitioner has failed to demonstrate the existence of any substantial federal question meriting the exercise of this Court's discretionary review pursuant to 28 U.S.C. § 1257(3) and therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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